

## Memorandum 96-2

### Homestead Exemption: Proceeds Exemption

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At the December meeting, the Commission requested the staff to provide more information on the policies and operation of an exemption for proceeds of the sale of a homestead. This memorandum discusses this issue and also presents some statutory issues that remained unresolved at the last meeting. Depending on the Commission's determination of the policy issues, the statutory issues will need to be decided so that the homestead exemption bill (approved at the November meeting) can be revised.

The recommendation as earlier approved has been introduced by Senator Kopp as Senate Bill 1368. A copy of the recommendation as approved in November is attached to this memorandum. It includes the proceeds exemption feature but makes it inapplicable against a support creditor unless the debtor applies to the court for an order granting all or part of the exemption taking into account the needs of the debtor and all the persons the debtor is required to support. Any revisions approved by the Commission can be offered as amendments to the bill before it is heard.

#### HOMESTEAD PROCEEDS EXEMPTION

##### **Background**

A summary of the existing proceeds exemption is set out in the attached recommendation on page 4. The statutory language is in Section 704.720 (automatic homestead exemption) on page 12 and Sections 704.960-704.965 (homestead declaration) on pages 20-21.

The policy supporting the proceeds exemption under the homestead declaration provisions — dating back to the early years of the Civil Code version of the statute that preceded the revision made by the Enforcement of Judgments Law in 1983 — is to provide a continuing protection and a degree of portability. Under the special circumstances of competing judgment liens and homestead declarations under former law, the exemption would have been lost if the judgment debtor moved to a new home in a county where a judgment lien had

been recorded, due to the rule that the first paper filed prevailed. Hence, the dragnet judgment lien could prevent any later homestead declarations, even though the debtor had protected the first home by recording the declaration before any judgment lien attached to it. This in turn would defeat the constitutional purpose to protect the family home, except in the limited case where a debtor recorded the homestead declaration first and never moved after the judgment lien attached.

Under the existing automatic exemption, a judgment debtor cannot sell the home without satisfying or removing the judgment lien, in effect applying the homestead exemption to the satisfaction of the judgment. Describing a similar situation in Oregon law, Prof. Frank Lacy wrote:

In consequence a judgment debtor's mobility — likely to be of particular importance to a person who is having trouble making it in his present location — was appreciably curtailed; he was, in a very real sense, a "prisoner in his home."

Lacy, *Homestead Exemption — Oregon Law: Still More*, 8 *Willamette L. Rev.* 327, 327 (1972).

It might be argued that a voluntary sale proceeds exemption is unnecessary because the debtor can declare bankruptcy and have the benefit of the exemption through the bankruptcy court by claiming the state set of exemptions under Code of Civil Procedure Section 703.140. This is a rather dramatic solution to the problem and one that may not be best under the circumstances. Bankruptcy may also be unavailable. However, bankruptcy does provide a safety valve in the event that the voluntary proceeds exemption in the declared homestead cannot be preserved in the automatic homestead exemption.

The amount of the California homestead exemption — \$50,000 to \$100,000 — magnifies the consequences of these rules. There is no escaping a fundamental difficulty in value-based homestead exemptions: the amount needed to protect the home has to be set high enough to discourage forced sales, but this amount may seem grossly excessive as a cash fund that cannot be reached by creditors. Prof. Vukowich, for this and other reasons, argued against providing a homestead exemption:

The homestead exemption is undesirable as a matter of policy since it removes substantial assets from creditors without commensurate benefits to society from home ownership by debtors. In many jurisdictions the value limitation placed on the debtor's

equity in his homestead is so low that the exemption does not permit him and his family to maintain their home. Since the debtor's equity in the home exceeds the value of the exemption, creditors may force the sale of the home; the debtor is paid in cash the dollar amount of the exemption, and the creditor is paid the remainder, not to exceed the amount of the debt owed. The money paid the debtor usually is exempt for six months or a year. The purpose of granting an exemption of the cash in the debtor's hands is to allow him to reinvest it in a new homestead. However the amount of cash is usually so small that no new homestead can be purchased. Consequently, during the six months or one year that the debtor holds the cash, his creditors cannot reach the cash, and the debtor cannot purchase a home. The debtor might spend the money during the time, and his creditors might be denied this asset for collection. Whether or not the debtor has the money at the end of the six months or year, the policies of the state are frustrated: the debtor has no home and the creditors' rights to collect are delayed for a significant time or lost altogether.

Setting the values of homestead exemptions at realistic levels unfairly compromises the rights of creditors. To remove \$10,000 to \$40,000 [the higher amounts 25 years ago] from the reach of judgment creditors when debtors and their families easily can establish homes in rental units defers too greatly to the interests of debtors. Nor is home ownership essential to family protection or debtor rehabilitation. Even the \$5,000 exemption [now \$15,000] recently recommended [in bankruptcy] is undesirable, since the amount thus denied creditors is great.

In summary, a comparison of the rather weak need for debtors to own their own homes with the significant impact substantial homestead exemptions have on creditors indicates that homestead exemption laws should be repealed.

Vukowich, *Debtors' Exemption Rights*, 62 Geo. L.J. 779, 806-07 (1974) (footnotes omitted). It does not appear that the professor's opinion has been very persuasive in state legislatures over the two decades since it was published.

### **Other Law**

We have not made an exhaustive survey of the current state of the law concerning the exemption of homestead proceeds. Secondary sources suggest that almost all states have some form of homestead protection (all but five or six), and that a significant number of them protect voluntary proceeds by statute (more than 10) . See S. Riesenfeld, *Creditors' Remedies and Debtors' Protection* 305 n. 21 (2d ed. 1975); Vukowich, *supra*, 62 Geo. L.J. at 833; see also R. Leonard,

Money Troubles: Legal Strategies To Cope with Your Debts, *Appendix 2* (2d ed. 1993). However, without examining the law in detail, it is difficult to come to any definitive conclusions on the exact numbers and the specific procedures and limitations that apply. As to the issue of whether disposition of the proceeds should be controlled, Prof. Vukowich writes that “[a]lthough many states require the debtor to hold the proceeds with the intention of acquiring a new homestead, a significant number do not” — the latter class including California’s declared homestead exemption.

*Uniform Exemptions Act.* Section 9 of the Uniform Exemptions Act promulgated by the National Conference of Commissioners on State Laws in 1976 provides a general rule for tracing exempt property. In relevant part, it provides:

(a) If property, or a part thereof, that could have been claimed as an exempt homestead ... has been sold or taken by condemnation, or has been lost, damaged, or destroyed and the owner has been indemnified therefor, the individual is entitled to an exemption of proceeds that are traceable for 18 months after the proceeds are received....

(c) [P]roceeds exempt under this Act are traceable under this section by application of the principle of first-in first-out, last-in first-out, or any other reasonable basis for tracing selected by the individual.

The comment notes that the section “protects proceeds of the sale or loss of property for the purpose of enabling the individual debtor to replace the property, a feature found in many homestead statutes or implied by the courts in construing the homestead laws.” The Uniform Exemptions Act does not attempt to restrict the use of the proceeds to the intended purpose of replacement. The amount of the homestead exemption under the uniform act is \$10,000 (in 1967 dollars). Only Alaska appears to have adopted this uniform act.

*Arizona.* The homestead exemption in Arizona is even more generous than ours. Arizona provides a \$100,000 dwelling exemption to any resident over 18. Ariz. Rev. Stat. Ann. § 33-1101 (Supp. 1995). The exemption continues in identifiable cash proceeds of a voluntary or involuntary sale of the property for 18 months after the date of sale or until a new homestead is established with the proceeds, whichever period is shorter. The homestead is applied by operation of law and no written claim or recording is required. *Id.* § 33-1102. A procedure is

provided for forcing the debtor to designate the property to which the exemption is to be applied.

*Maine.* A homestead exemption of \$12,500-\$25,000 or up to nearly \$120,000 for persons over 60 or disabled persons is provided. Maine Rev. Stat. Ann. tit. 14 § 4422 (Supp. 1993). Interestingly, the super-exemption for the disabled or elderly does not apply to judgments based on torts involving other than ordinary negligence on the part of the debtor. Proceeds of any sale of an exempt homestead are exempt for six months from the date of receipt “for purposes of reinvesting in a residence within that period.” *Id.*

*Oregon.* A \$25,000-\$33,000 homestead exemption is provided without the necessity of a claim. Or. Rev. Stat. Ann. § 23.240 (Butterworth Supp. 1994). The exemption is not impaired by sale of the property. Proceeds remain exempt for a period of one year if held “with the intention to procure another homestead therewith.” *Id.* A procedure is provided for determining and discharging a lien on homestead property transferred or to be transferred by a homestead claimant. *Id.* § 23.280. Like California, Oregon law provides a scheme for discretionary division of the homestead exemption in cases involving competing support obligations. *Id.* § 23.242.

*Texas.* The homestead in Texas is based on acreage, not value. An urban homestead consists of not more than one acre, in one or more lots, together with improvements, whereas a rural homestead consists of 100-200 acres, in one or more parcels, together with improvements. Tex. Prop. Code Ann. § 41.002 (West Supp. 1996). Proceeds are exempt for six months after date of sale. *Id.* § 41.001(c).

*Wisconsin.* A resident homeowner is entitled to an exemption of \$40,000. Wis. Stat. Ann. § 815.20 (1994). Proceeds of a sale are exempt in this amount “while held, with the intention to procure another homestead with the proceeds, for 2 years.” *Id.*

## DRAFTING ISSUES

### **Protective Rules on Proceeds Exemption**

At the November meeting, the Commission approved the homestead exemption recommendation (see attached copy) subject to working out additional rules to restrict the freedom to dispose of exempt proceeds from sale of a homestead. The intention is to honor the purpose of the exemption by shielding proceeds for up to six months to enable the debtor to purchase another

home. The staff has sought to work with the title companies to develop an appropriate procedure that does not place burdens on the title insurance industry. The staff has been conferring with the California Land Title Association, but as yet we have not gotten CLTA's final input.

The staff believes that the proposal set forth in Memorandum 95-75, and repeated here, would satisfy these goals. The proposed procedure is intended to preserve the proceeds for use in the purchase of another home in California and not to provide a large cash fund for the use of the debtor for some other purpose.

The following draft provides that all homestead proceeds, whether from a voluntary or involuntary sale, should be restricted to the purchase of another home within six months of the time proceeds are payable to the debtor. The Commission should consider whether the restriction should apply only as to voluntary sales. If a debtor's house burns down or is destroyed in an earthquake or flood, should the debtor be able to use the insurance proceeds in the amount of the homestead exemption (\$50,000-\$100,000) for any purpose? Existing law provides no restriction on the use of proceeds from an involuntary sale through execution or condemnation or of insurance for damage or destruction of the home. However, in view of the sizable exemption provided for homesteads, it seems a fair trade-off that the proceeds be restricted to the purpose of providing a home for the debtor and the debtor's family. Note, however, that this limitation would not apply in bankruptcy.

The draft also restricts the proceeds exemption to the purchase of another home in California. We have not found any other statute, of the several examined, that explicitly provides this type of limitation. However, it is implicit in many states' laws which restrict their exemptions to residents of the state. The exemption would obviously evaporate the instant the debtor moved to another state and one cannot qualify out-of-state property for a homestead exemption in any jurisdiction we know of. Some jurisdictions have preconditions to satisfying the law that would require purchase in that state, such as registering a mobile home or having acquired property six months before execution. Thus, the limitation is not particularly novel.

To provide otherwise would add potentially significant burdens to the creditor's attempt to enforce the money judgment and invite debtors to attempt to leave the state to defeat the judgment lien. While some may think it is simply part of the game to defeat judgment liens, the policy of the law should be to encourage benign liens of record, such as the judgment lien, which do not

generally disrupt debtors' possession of their homes. If too many limitations and costs are imposed on judgment liens, creditors may be compelled to use execution and force debtors out of their homes.

The following draft shows the additional revisions that would need to be made in Section 704.720 as set out in the attached recommendation (p. 12) to control the proceeds exemption:

**Code Civ. Proc. § 704.720 (amended). Homestead exemption**

SEC. 5. Section 704.720 of the Code of Civil Procedure is amended to read:

704.720. (a) A homestead is exempt from enforcement of a money judgment as provided in this article and is exempt from sale under this division to the extent provided in Section 704.800.

(b) The proceeds from a disposition of a homestead are exempt for the purpose of purchasing another homestead in this state under the following conditions:

(1) If a homestead is sold under this division or is damaged or destroyed or is acquired for public use, the proceeds of sale or of insurance or other indemnification for damage or destruction of the homestead or the proceeds received as compensation for a homestead acquired for public use are exempt in the amount of the homestead exemption provided in Section 704.730 for a period of six months after the date the proceeds ~~are actually received by~~ become payable to the judgment debtor.

(2) If a homestead is voluntarily sold, or otherwise sold in a manner not described in paragraph (1), the proceeds of sale are exempt in the amount of the homestead exemption provided in Section 704.730 for a period of six months after the date of the sale.

(3) If a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during the six-month period provided in paragraph (1) or (2), the proceeds exemption terminates.

(c) If the judgment debtor and spouse of the judgment debtor reside in separate homesteads, only the homestead of one of the spouses is exempt and only the proceeds of the exempt homestead are exempt.

(d) The exemption of proceeds provided in paragraph (2) of subdivision (b) does not apply to the enforcement of a judgment for child, family, or spousal support, unless the judgment debtor obtains an order, on noticed motion, that the proceeds are exempt in all or part. In making this determination, the court shall apply the standards provided in subdivision (c) of Section 703.070.

(e) Unless otherwise agreed by the judgment debtor and judgment creditor, proceeds exempt or claimed to be exempt under this section shall be deposited with the court. At any time during the six-month exemption

period, the court shall, on noticed motion of the judgment debtor, make an order applying the proceeds to the purchase of another dwelling in this state. Unless the judgment debtor purchases another dwelling in this state during the six-month exemption period, the court, on noticed motion, shall order the proceeds applied to the satisfaction of the judgment.

(f) The proper court for filing motions under this section is the court where an application for an order of sale of the dwelling would be made under Section 704.750.

**Comment.** Subdivision (a) of Section 704.720 is revised for clarity and for consistency with other exemption provisions. See, e.g., Sections 703.010, 704.010, 704.020.

Subdivision (b) is amended to adopt as a general rule the exemption for proceeds of voluntary sales under former Section 704.960 (homestead declaration) and to make clear that the purpose of the proceeds exemption is to permit the debtor to attempt to buy another dwelling in California. Subdivision (b)(1) is amended to provide that the six-month exemption period runs from the date when the proceeds become payable to the debtor rather than when the debtor actually receives the proceeds. This revision is necessary to conform with the procedure in subdivision (e) for restricting the judgment debtor's access to the exempt proceeds. Subdivision (b)(3) is generalized from the last clause of former subdivision (b) of this section. See also Section 703.080 (tracing exempt funds).

Subdivision (d) is a new provision which implements the application of the general rule on equitable division of exemptions in Section 703.070 in a situation where the judgment debtor has multiple support obligees. Unlike the general rule, however, subdivision (d) places the burden on the judgment debtor to file the motion and seek the court order.

Subdivision (e) provides a new procedure for restricting the judgment debtor's access to the exempt proceeds, in fulfillment of the purpose of the homestead exemption.

Subdivision (f) specifies the proper court for proceedings under this section.

### **Family Support Council Suggestions**

The attached letter from John Higgins on behalf of the Family Support Council, suggests a revision of draft Section 704.720(d). (This letter was originally presented in the Second Supplement to Memorandum 95-75, on the agenda for the December 1995 meeting, but decision on the issue was postponed.) Mr. Higgins suggests that the procedure for obtaining an equitable division of the homestead exemption among the persons the debtor is required to support should be available only if the debtor has additional child, family, or spousal support obligations. In other words, a debtor who could claim only the need to support himself or herself would not be allowed to seek a court order applying the exemption in the case of enforcement of child, family, or spousal support against proceeds of the voluntary sale of a homestead. The concern expressed by Mr. Higgins relates to whether the procedure should be available in the absence

of competing support creditors, permitting the court to take the judgment debtor's own needs into account and whether the court should be able to consider "all other relevant circumstances" in such a case.

The Commission needs to consider whether this limitation should be adopted. The staff does not think the "all other relevant circumstances" language is very significant and that it would be an exceedingly rare case where a court would allow all or part of the exemption based on the judgment debtor's individual needs as against the needs of the persons the debtor is required to support. The general standard in Section 703.070 (which is unchanged since its enactment in 1982) assumes that the court will balance the needs of all of these persons and make an equitable division of the property. As a general rule, it permits support creditors to invade the exemptions to which the debtor is normally entitled. As noted in the Commission's comment to the section, it is generalized from the case law on dividing earnings. In *Rankins v. Rankins*, 52 Cal. App. 2d 231, 234-35, 126 P.2d 125 (1942) (cited in the comment), the court stated: "Obviously, the husband cannot be deprived of the means of livelihood, even for the most solemn obligation to others. He cannot earn without eating. Equally, the second family, which is authorized by our laws, is entitled to support."

The staff still believes this is the best rule. We doubt that there is a significant risk that debtors will obtain overreaching court orders under the proposed procedure. However, if a more limited rule is desirable for practical reasons (such as the assumption that the debtor will always be able to fend for himself, probably from money he has hidden from the creditor), the procedure in draft Section 704.720(d) could be restricted to other support obligations as proposed by Mr. Higgins.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary

DEC-07-1995 11:39

FSD

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## FACSIMILE TRANSMITTAL

DATE: 12, 7, 95PAGE 1 OF 1Law Revision Commission  
RECEIVEDTO: Stan UlrichFAX #: (415) 494-1827

DEC 07 1995

File: D-352PHONE # AT THAT LOCATION: (415) 494-1335FROM: John S. Higgins, Jr., Deputy Dist. Atty., Visalia  
Phone No. (209) 733-6917  
FAX No. (209) 730-2595SUBJECT: Homestead proposal

## Suggested Changes in Homestead Exemption Proposal:

Comment: The comment of the Law Revision Commission with respect to proposed CCP §704.720(d) is that it will implement equitable division principles of CCP §703.070 "in a situation where the debtor has multiple support obligees." Actually, application of the equitable distribution scheme of CCP §703.070 is much broader and allows the court to deprive the support creditor of the homestead proceeds based "upon the needs of the judgment debtor" and "all other relevant circumstances." Thus, a debtor with no other support obligees may be awarded up to the full amount of the exemption in a voluntary sale of the homestead.

## Suggested Language Changes to Proposed CCP §704.720(d):

"(d) The exemption proceeds provided in paragraph (2) of subdivision (b) does not apply to the enforcement of a judgment for child, family, or spousal support unless the judgment debtor has other obligations for the support of a spouse, former spouse or child, and then only to the extent that the judgment debtor obtains an order on noticed motion that the proceeds are exempt in all or part. In making this determination the court shall apply the standards provided in subdivision (c) of Section 703.070."

#D-352

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STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

RECOMMENDATION

Homestead Exemption

November 1995

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739  
(415) 494-1335 FAX: (415) 494-1827

November 2, 1995

To: The Honorable Pete Wilson  
*Governor of California*, and  
The Legislature of California

The Commission proposes repealing the declared homestead exemption and amending the automatic homestead exemption to protect proceeds of a voluntary sale on the same basis as other homestead proceeds are protected. Dwelling proceeds would be exempt to the extent traceable in deposit accounts and cash or its equivalent, with the burden on the exemption claimant to prove the exemption. Consistent with the general rule applicable to execution sales, the statute would be revised to require satisfaction of senior liens and encumbrances, rather than all liens and encumbrances on the property, and junior liens would be extinguished.

This recommendation was prepared pursuant to Resolution Chapter 40 of the Statutes of 1983, continued in Resolution Chapter 87 of the Statutes of 1995.

Respectfully submitted,

Colin W. Wied  
Chairperson

## HOMESTEAD EXEMPTION

The Enforcement of Judgments Law<sup>1</sup> contains two procedures relating to homestead exemptions from enforcement of money judgments: the automatic homestead exemption and the homestead declaration.<sup>2</sup> This recommendation proposes repealing the homestead declaration procedure and preserving its beneficial aspects in the general automatic homestead exemption.

### Background

There is no requirement that the law provide a homestead *declaration* procedure. The California Constitution requires the Legislature to “protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families.”<sup>3</sup> The procedure for implementing this constitutional mandate is determined by the Legislature.<sup>4</sup>

California has not always had a homestead declaration procedure. A claimed homestead procedure existed from 1851 until it was superseded by the declared homestead in the early 1860’s.<sup>5</sup> For over a century, the homestead was protected against money judgment liens only if the homestead declaration was recorded before the judgment lien. The principle of first in time, first in right was applied with drastic consequences to the tardy debtor. To protect families of debtors who failed to record the exemption before death, the probate homestead procedure was developed, permitting the court to declare an exemption.<sup>6</sup>

In 1974, the Legislature enacted a second procedure enabling a debtor who had not recorded a homestead declaration to claim an exemption when the dwelling was levied on under a writ of execution.<sup>7</sup> The judgment creditor was required to petition for issuance of a writ of execution directed against a dwelling and give

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1. See 1982 Cal. Stat. ch. 1364, operative July 1, 1983. The Enforcement of Judgments Law was enacted on recommendation of the Commission. See *1982 Creditors’ Remedies Legislation*, 16 Cal. L. Revision Comm’n Reports 1001, 1009 (1982).

2. See Code Civ. Proc. §§ 704.710-704.850 (“automatic” homestead exemption), 704.910-704.995 (declared homesteads). (All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.) The homestead declaration procedure is not complete, incorporating many substantive provisions of the automatic homestead exemption. See Sections 704.910(c) & (e), 704.950(c)(2), 704.960((a), 704.965, 704.970(b), 704.995(c). The Commission recommended repeal of the declared homestead in favor of the automatic homestead in its 1980 report. See *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm’n Reports 2001, 2090-93, 2611-12 (1980).

3. Cal. Const. Art. XX, § 1.5.

4. See, e.g., *Noble v. Hook*, 24 Cal. 638 (1864).

5. For detailed background on the history of the exemption, see *Taylor v. Madigan*, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975); Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723 (1978) (prepared by Commission consultant).

6. See *Taylor v. Madigan*, 53 Cal. App. 3d 943, 968, 126 Cal. Rptr. 376 (1975).

7. See 1974 Cal. Stat. ch. 1251, superseded by a revised but similar procedure, 1976 Cal. Stat. ch. 1000.

notice to the debtor who could then assert the exemption. This procedure was substantially revised in the Enforcement of Judgments Law enacted in 1982, resulting in the homestead exemption procedure in Code of Civil Procedure Sections 704.710-704.850. The probate homestead was put on an independent footing, unrelated to the homestead declaration.<sup>8</sup>

**Automatic Homestead Exemption (Code Civ. Proc. §§ 704.710-704.850)**

The “automatic” homestead exemption — or dwelling house exemption, as it is also known — requires the judgment creditor to initiate court proceedings to determine whether the property is exempt and the amount of the exemption. Generally where property is levied on to enforce a money judgment, the debtor is given notice of levy and must make an exemption claim within 10 days.<sup>9</sup> A creditor who levies on a “dwelling,”<sup>10</sup> which may be an exempt homestead, may not have it sold to enforce a money judgment without first obtaining a court order for sale. The creditor must apply for the order for sale within 20 days after notice of levy is served on the judgment debtor.<sup>11</sup> The judgment creditor’s application is not simple: the creditor must determine whether the county tax assessor’s records show a current homeowner’s exemption or disabled veteran’s exemption, must state on information and belief whether the dwelling is a homestead, the amount of the exemption, and whether there is a homestead declaration recorded, and must state the amount of liens and encumbrances and the address of other lien creditors and encumbrancers as shown in the recorder’s files.<sup>12</sup> The creditor must give notice of the application, including personal service on any occupant, at least 30 days before the hearing.<sup>13</sup> At the hearing, the creditor has the burden of showing the dwelling is not exempt if there is a tax exemption on file in the tax assessor’s office; otherwise, the burden is on the debtor to prove the exempt status.<sup>14</sup> The property is appraised, and if it is of sufficient value, it is ordered to be sold. Notice of the sale cannot be given until at least 120 days after the notice of levy.<sup>15</sup> Ultimately, the homestead cannot be sold unless the bid exceeds the amount of the applicable homestead exemption plus the amount necessary to satisfy all liens and encumbrances on the property, and the price must be 90 percent of the appraised value unless the court orders otherwise.<sup>16</sup> Proceeds of a sale are distributed first to

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8. See Prob. Code §§ 60, 6520-6528; *Recommendation Relating to Probate Homestead*, 15 Cal. L. Revision Comm’n Reports 401 (1980).

9. Section 703.520.

10. A detailed definition of “dwelling” is set out in Section 704.710.

11. Sections 704.740-704.750.

12. Section 704.760.

13. Section 704.770.

14. Section 704.780(a). This delay affords an opportunity for the debtor to redeem from the lien.

15. Section 701.545.

16. Section 704.800.

pay off “all liens and encumbrances,” second to the debtor in the amount of the exemption, third to the levying officer for costs, and finally to the judgment creditor to apply to the judgment.<sup>17</sup>

This procedure is highly protective of debtors’ homesteads. There are multiple notices, including personal service, built-in delays and a second chance proceeding, significant procedural burdens, appraisals with presumptive minimum bids, and burden shifting. In light of these protections, there is no need for a separate homestead declaration procedure.

### **Modern Declared Homestead Exemption (Sections 704.910-704.995)**

The minimal declared homestead procedure that has existed since 1982 is largely a formality. A homeowner or spouse of a homeowner may record a homestead declaration describing the principal dwelling. The declaration must be acknowledged in the manner of a conveyance of real property.<sup>18</sup> Unlike its predecessor, the modern homestead declaration has no effect on the right to convey or encumber the property.<sup>19</sup> Nor does it prevent creation of judgment liens.<sup>20</sup> It does not prevent attachment liens<sup>21</sup> or state tax liens.<sup>22</sup>

While the real homestead protection lies in the automatic exemption statute, the homestead declaration provides several distinct features that must be evaluated before the procedure can be repealed:

1. *Judgment lien attaches only to surplus value.* Section 704.950 is a major source of confusion. Subdivision (a) provides that judgment liens do not attach to property subject to a prior homestead declaration, seemingly preserving the old shield rule. However, subdivision (a) is subject to the exception provided in subdivision (c), which provides that a judgment lien *does* attach to the surplus value of the property over all senior liens and encumbrances plus the homestead exemption amount. Thus, the exception in subdivision (c) eats up the rule in subdivision (a).<sup>23</sup>

This section presents a conceptual conundrum. How can it be determined whether the judgment lien has attached? The amount of the homestead exemption can change, as well as the amount of senior liens. A judgment lien attaches to any property owned or acquired by a debtor in the county where the abstract of judgment is recorded; it is a “dagnet” lien and is not directed at particular

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17. Section 704.850.

18. Sections 704.920-704.930.

19. Section 704.940.

20. Section 704.950(c).

21. Section 487.025.

22. Gov’t Code § 7170(a).

23. Subdivision (c) was added to Section 704.950 at the last opportunity when the bill was before the Legislature, as is evident from the Comment which was not revised to reflect the final statutory language.

property.<sup>24</sup> How can it be determined when the lien attaches since the value of the property is unknown in the absence of a sale or appraisal? Section 704.950(a) provides that the lien does not attach, subject to the exception in subdivision (c). Subdivision (c) provides that the lien attaches to the surplus value, but does not say when the lien attaches. Arguably it attaches only when the surplus value exists. Section 704.965 locks in the exemption amount at the time when the lien attaches, but when is that?

This rule, then, does not appear to provide any clear advantage to the homestead declaration. Theoretically, it might be easier to sell real property free of the judgment lien if there were a prior homestead declaration recorded, assuming that the debtor's equity in the property was agreed by all parties to be less than the homestead exemption amount at the time of transfer. But this does not appear to be a practical advantage, and does not justify continuing the cumbersome homestead declaration procedure.

2. *Exemption of proceeds of voluntary sale.* Section 704.960(a) protects the proceeds of a voluntary sale of the homestead for six months after the date of sale. The automatic homestead exemption protects proceeds of sale, but only where the homestead is sold at an execution sale, is damaged or destroyed, or is acquired for public use — in other words, not in the case of a voluntary sale.<sup>25</sup> The proceeds exemption is limited, however, so that it does not include any increase in the exemption occurring after a judgment lien attaches.<sup>26</sup> This is consistent with the general rule that the amount of an exemption is determined according to the law in effect when the creditor's lien attaches to the property.<sup>27</sup>

Under the existing scheme, a sufficiently sophisticated debtor would simply record a homestead declaration before a voluntary sale of the home and thereby protect the proceeds for six months in the amount applicable when the creditor's lien attached. The Commission can envision no public policy that is served by this formality. The creditor cannot prevent the declaration. The proceeds exemption follows mechanically from the act of recording a piece of paper. The specific amount of the voluntary proceeds exemption depends on the fortuity of the order in which the debtor and the creditor record their respective papers. The recording has no relation to any other act. It is not reviewed and notice is not given. It is not

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24. See Section 697.340.

25. See Section 704.720(b).

26. Section 704.965. This rule was added to the law in conjunction with a bill increasing the amount of the homestead exemption. See 1984 Cal. Stat. ch. 454. The limitation in Section 704.965 is irrelevant to the homestead exemption as applied in a forced sale by the judgment creditor. See Section 704.970(b). If a second homestead is purchased with exempt proceeds limited by the rule in Section 704.965, it appears that the exemption of voluntary sale proceeds from the second homestead would also be limited to the level locked in by the order of recording the judgment lien and initial homestead declaration. Similarly, if the homestead declaration had been recorded before any attachment or judgment lien, the debtor would have the benefit of any increased exemption amounts based solely on order of recording.

27. Section 703.050. See also Section 703.060 (liens deemed granted by statute in recognition of power of state to repeal, alter, or add to exemptions).

subject to contest at the time of recording. The protection of voluntary sale proceeds depends solely on the arbitrary factor of whether the debtor has remembered to record a paper, a paper which will then clutter up the public records for years, since it describes as a homestead property that the debtor intends to sell shortly after the declaration is recorded.

The justification for the reforms of the old homestead declaration, which resulted in the modern automatic homestead exemption, apply as well to the exemption of proceeds. Since a prior judgment lien does not prevent recording a homestead declaration with its attendant voluntary sale proceeds exemption, the proceeds exemption should be incorporated into the automatic homestead exemption. The better procedure is the general one — proceeds of a voluntary sale are exempt for six months following sale and the burden is on the debtor to claim the exemption and trace the proceeds.<sup>28</sup>

3. *Relation-back of declared homestead.* Section 704.960(b) provides a portability feature, permitting the debtor to record a homestead declaration on property acquired with proceeds from a sale of a declared homestead and continue the original recording priority in the new homestead. This applies to any exempt homestead proceeds, whether from voluntary or forced sale, or reimbursement from insurance, so long as the new declaration is recorded within six-month period during which proceeds are protected.

This feature also permits the debtor to lock in the opportunity to take advantage of later statutory increases in the homestead exemption amounts.<sup>29</sup> A person who records a homestead declaration before a creditor's lien attaches can preserve that priority and receive the benefit of increased exemptions in proceeds and in a home purchased with exempt proceeds.<sup>30</sup>

The general rule is that the amount of an exemption is determined under the law in effect when the creditor's lien attached to the property.<sup>31</sup> The general rule should be applied to homesteads, independent of the fortuity of whether a homestead declaration may have been filed.

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28. For the general rules applicable to proceeds exemptions, see, e.g., Sections 703.030 (manner of claiming exemptions; effect of failure to claim), 703.080 (tracing exempt funds).

29. See Section 704.965.

30. The exact outcome depends on the interpretation given Section 704.965. If the creditor's judgment lien attaches as of the time it is recorded, notwithstanding the language of Section 704.950(c) concerning what amount the lien attaches to (surplus over senior liens and homestead exemption amount under Section 704.730), then the problem is a simple one of comparing dates of recording. But if the creditor "obtains" a lien only at the instant that the value of the homestead actually exceeds the value of liens senior to the judgment lien at the time it was recorded plus the value of the homestead exemption — then the increased exemption, by relation back, would have the effect of forestalling the time when the judgment lien could attach to any surplus value. It is also assumed that Section 704.965 serves as an exception to the general rule in Section 703.050 that the amount of exemptions is fixed as of the time the creditor's lien is created on the property.

31. Section 703.050.

4. *Continuation of homestead after death.* Section 704.995 provides that the protection of the declared homestead from a creditor having an attachment lien, execution lien, or judgment lien continues after the death of the declared homestead owner if the dwelling was the principal dwelling of the surviving spouse or a member of the decedent's family to whom an interest in the dwelling passes. But subdivision (c) provides that the amount of the exemption is determined under Section 704.730 in the general procedure depending on the circumstances of the case at the time the amount is required to be determined.<sup>32</sup> Where special protection of the family home is appropriate, the probate homestead is the better procedure.<sup>33</sup> The existing homestead declaration procedure provides no meaningful, additional protection in the case of enforcement proceedings. Section 704.995 harks back to a time when the declared homestead created important rights in homestead property that could descend to the survivors even contrary to a testamentary disposition.

5. *Prima facie evidence.* Section 704.940 provides that the homestead declaration is prima facie evidence of the matters stated, which would include the statement that the property is the dwelling of the persons listed. Arguably, this provision may put some burden on the judgment creditor in proceedings to sell a dwelling. However, the relevant procedural provisions do not shift the burden to the creditor as in the case of a current homeowner's tax exemption or disabled veteran's tax exemption.<sup>34</sup> While the creditor is required to determine and report whether there is homestead declaration<sup>35</sup> as part of the procedure for obtaining an order for sale of a dwelling, no statutory duty results from the report.

### **Problems Created by Separate Homestead Declaration Procedure**

The declared homestead provisions present a number of problems which should be weighed against any claimed advantages:

1. *Uncertainty.* The one feature a declared homestead procedure based on filing with the county recorder should have is certainty — yet no one can rely on the validity of a homestead declaration. The filing sits in the records, but has little meaning unless it is tested in execution proceedings. The debtor may have moved to another residence or the debtor's marriage may be dissolved. A later declaration as to different property acts as an abandonment *pro tanto* of the interest of the declarant.<sup>36</sup> Thus, if spouses choose to live apart, and a second (or second and third) declaration is recorded, the first declaration becomes meaningless.

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32. This is in apparent conflict with the rule in Section 704.965.

33. See Prob. Code §§ 60, 6520-6528; *Recommendation Relating to Probate Homestead*, 15 Cal. L. Revision Comm'n Reports 401 (1980).

34. See Section 704.780.

35. Section 704.760(b).

36. Section 704.990(b).

2. *Illusory protection.* The homestead declaration provides little real protection for the family home. The most important protections (other than the voluntary sale proceeds exemption) are embodied in the automatic homestead. The homestead declaration can only give a false sense of security. In any event, most homeowners have no need for the protection, because most homeowners never become judgment debtors. If they do become judgment debtors, the statute should provide essential protections without regard to whether a paper may have been filed at some time in the past.

3. *Opportunity for misleading homestead declaration mills.* Anyone who has purchased a house in recent years has probably received one or more solicitations from the homestead declaration mills.<sup>37</sup> Experience with these dubious operations, whose broadsides typically misrepresent the law, impelled the Legislature to enact a consumer protection statute governing homestead filing services.<sup>38</sup> One operator who ran afoul of the statute mailed approximately four million solicitations in a four-year period *after* enactment of the regulatory statute.<sup>39</sup> Repeal of the declared homestead would put an end to the opportunity to profit from causing undue alarm and confusing homeowners throughout the state.

### **Satisfaction of Other Liens and Encumbrances**

The minimum bid in the sale of a homestead must include an amount sufficient to satisfy "all liens and encumbrances on the property."<sup>40</sup> This language is an artifact surviving from the time when a judgment lien could not attach if there was a prior homestead declaration on record.<sup>41</sup> Notwithstanding the prior homestead declaration, however, the creditor could seek enforcement of the money judgment by writ of execution. If the property was sold on execution without a pre-existing judgment lien in favor of the creditor, there would be no junior liens practically speaking, and *all* the other liens on the property, whether mortgage liens, tax liens, other judgment liens, would be superior to the creditor's execution lien. If the creditor had won the race to the recorder's office and the judgment lien had attached first, then there would be no application of the "all liens and encumbrances" language since the homestead exemption would not apply. Instead, the various lienors would have had an opportunity to engage in several rounds of

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37. See Arthur M. Louis, *Homesteading Scam Targets Unwary Homeowners*, San Francisco Chronicle, Sept. 19, 1994, at B1, B3. For a sample solicitation from Morse & Associates, see Memorandum 95-22, Exhibit pp. 22-24, on file with California Law Revision Commission. The text of the solicitation is also set out in Appendix A to *In re Morse*, 11 Cal. 4th 184, 900 P.2d 1170, 44 Cal. Rptr. 2d 620, 637-39 (1995).

38. See Bus. & Prof. Code § 17537.6.

39. See *People v. Morse*, 21 Cal. App. 4th 259, 25 Cal. Rptr. 2d 816 (1993); see also *In re Morse*, 11 Cal. 4th 184, 900 P.2d 1170, 44 Cal. Rptr. 2d 620 (1995).

40. Section 704.800.

41. See discussions of prior law in *Tentative Recommendation Proposing the Enforcement of Judgments Law*, 15 Cal. L. Revision Comm'n Reports 2001, 2094 (1980); Adams, *Homestead Legislation in California*, 9 Pac. L.J. 723 (1978); Taylor v. Madigan, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975).

redemptions, with junior lienholders redeeming from their seniors and the debtor redeeming where possible.

Under existing law, the "all liens and encumbrances" language can act in an arbitrary manner and benefit the profligate or severely unlucky debtor. If a debtor has enough liens on the property, no creditor can reach it because any creditor would have to pay off all other liens, junior and senior, under the terms of the statute. On the other side of the coin, the home of a more responsible debtor would not be as hard to reach.

### **Commission Recommendations**

In summary, the Commission proposes repealing the declared homestead exemption and amending the automatic homestead exemption to protect proceeds of a voluntary sale on the same basis as other proceeds are protected. Dwelling proceeds would be exempt to the extent traceable in deposit accounts and cash or its equivalent, with the burden on the exemption claimant to prove the exemption. The statute should be revised to require satisfaction of *senior* liens and encumbrances, rather than *all* liens and encumbrances on the property, and junior liens would be extinguished, consistent with the general rule applicable to execution sales.

## PROPOSED LEGISLATION

### **Bus. & Prof. Code § 17537.6 (repealed). Homestead filing service regulation**

SECTION 1. Section 17537.6 of the Business and Professions Code is repealed.

~~17537.6. (a) It is unlawful for any person to make any untrue or misleading statements in any manner in connection with the offering or performance of a homestead filing service. For the purpose of this section, an "untrue or misleading statement" means and includes any representation that any of the following is true:~~

~~(1) The preparation or recordation of a homestead declaration will in any manner prevent the forced sale of a judgment debtor's dwelling.~~

~~(2) The preparation or recordation of a homestead declaration will prevent the foreclosure of a mortgage, deed of trust, or mechanic's lien.~~

~~(3) Any of the provisions relating to the homestead exemption set forth in Article 4 (commencing with Section 704.710) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure are available only to persons who prepare or record a homestead declaration.~~

~~(4) A homestead declaration is in any way related to the obtaining of any applicable homeowner's exemption to real property taxes.~~

~~(5) The preparation or recordation of a homestead declaration is required by law in any manner.~~

~~(6) The offeror of the homestead filing service has a file or record covering a person to whom a solicitation is made.~~

~~(7) The offeror of the homestead filing service is, or is affiliated with, any charitable or public service entity unless the offeror is, or is affiliated with, a charitable organization which has qualified for a tax exemption under Section 501(c)(3) of the Internal Revenue Code.~~

~~(8) The offeror of the homestead filing service is, or is affiliated with, any governmental entity. A violation of this paragraph includes, but is not limited to, the following:~~

~~(A) The misleading use of any governmental seal, emblem, or other similar symbol.~~

~~(B) The use of a business name including the word "homestead" and the word "agency," "bureau," "department," "division," "federal," "state," "county," "city," "municipal," "California," or "United States," or the name of any city, county, city and county, or any governmental entity.~~

~~(C) The use of an envelope that simulates an envelope containing a government check, tax bill, or government notice or an envelope which otherwise has the capacity to be confused with, or mistaken for, an envelope sent by a governmental entity.~~

~~(b)(1) It is unlawful to offer to perform a homestead filing service without making the following disclosure:~~

~~THIS HOMESTEAD FILING SERVICE IS NOT ASSOCIATED WITH ANY GOVERNMENT AGENCY.~~

~~YOU DO NOT HAVE TO RECORD A HOMESTEAD DECLARATION.~~

~~RECORDING A HOMESTEAD DECLARATION DOES NOT PROTECT YOUR HOME AGAINST FORCED SALE BY A CREDITOR. YOU MAY WISH TO CONSULT A LAWYER ABOUT THE BENEFITS OF RECORDING A HOMESTEAD DECLARATION.~~

~~IF YOU WANT TO RECORD A HOMESTEAD, YOU CAN FILL OUT A HOMESTEAD DECLARATION FORM BY YOURSELF, HAVE YOUR SIGNATURE NOTARIZED, AND HAVE THE FORM RECORDED BY THE COUNTY RECORDER.~~

~~(2) The disclosure specified in paragraph (1) shall be placed at the top of each page of every advertisement or promotional material disseminated by an offeror of a homestead filing service and shall be printed in 12-point boldface type enclosed in a box formed by a heavy line.~~

~~(3) The disclosure specified in paragraph (1) shall be recited at the beginning of every oral solicitation and every broadcast advertisement and shall be delivered in printed form as prescribed by paragraph (2) before the time each person who responds to the oral solicitation or broadcast advertisement is obligated to pay for any service.~~

~~(c) In addition to any other service, every offeror of a homestead filing service shall deliver each notarized homestead declaration to the appropriate county recorder for recordation as soon as needed or required by a homestead declarant, but no later than 10 days after the homestead declaration is notarized. The offeror of the homestead filing service shall pay all fees charged in connection with the notarization and recordation of the homestead declaration.~~

~~(d) No offeror of a homestead filing service shall charge, demand, or collect any money until after the homestead declaration is recorded. The total amount charged, demanded, or collected by an offeror of a homestead filing service, including all fees for notarization and recordation, shall not exceed twenty-five dollars (\$25).~~

~~(e) For the purposes of this section, the following definitions apply:~~

~~(1) "Homestead filing service" means any service performed or offered to be performed for compensation in connection with the preparation or completion of a homestead declaration or in connection with the assistance in any manner of another person to prepare or complete a homestead declaration. "Homestead filing service" does not include any service performed by an attorney at law authorized to practice in this state for a client who has retained that attorney or an employee of that attorney acting under the attorney's direction and supervision.~~

~~(2) A "homestead declaration" has the meaning described in Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure.~~

**Comment.** Former Section 17537.6 is superseded by new Section 17537.6.

**Bus. & Prof. Code § 17537.6 (added). Unlawful to offer homestead filing service**

SEC. 2. Section 17537.6 is added to the Business and Professions Code, to read:  
17537.6. (a) On and after January 1, 1997, it is unlawful for any person to offer a homestead filing service.

(b) For the purposes of this section, the following definitions apply:

(1) "Homestead filing service" means any service performed or offered to be performed for compensation in connection with the preparation or completion of a homestead declaration or in connection with the assistance in any manner of another person to prepare or complete a homestead declaration.

(2) A "homestead declaration" has the meaning provided in former Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure.

**Comment.** Section 17537.6 reflects the repeal of the homestead declaration procedure. See also Code Civ. Proc. § 694.090 (effect of homestead declaration under former law).

**Code Civ. Proc. § 487.025 (repealed). Right to attach declared homestead**

SEC. 3. Section 487.025 of the Code of Civil Procedure is repealed:

~~487.025. (a) The recording of a homestead declaration (as defined in Section 704.910) does not limit or affect the right of a plaintiff to attach the declared homestead described in the homestead declaration, whether the homestead declaration is recorded before or after the declared homestead is attached.~~

~~(b) An attachment lien attaches to a homestead (as defined in Section 704.710) in the amount of any surplus over the total of the following:~~

~~(1) All liens and encumbrances on the homestead at the time the attachment lien is created.~~

~~(2) The homestead exemption set forth in Section 704.730.~~

~~(c) Nothing in subdivision (a) or (b) limits the right of the defendant to an exemption under subdivision (b) of Section 487.020.~~

~~(d) Notwithstanding subdivision (b), a homestead (as defined in Section 704.710) is exempt from sale to the extent provided in Section 704.800 when it is sought to be sold to enforce the judgment obtained in the action in which the attachment was obtained.~~

**Comment.** Section 6528 is repealed because it is not necessary in view of the repeal of the homestead declaration procedure. See also Code Civ. Proc. § 694.090 (effect of homestead declaration under former law).

**Code Civ. Proc. § 694.090 (amended). Effect of homestead declaration**

SEC. 4. Section 694.090 of the Code of Civil Procedure is amended to read:

694.090. On and after ~~the operative date~~ January 1, 1997, a declaration of homestead made under prior law pursuant to Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code ~~is effective only to the extent provided in or~~ Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of this code is ineffective.

**Comment.** Section 694.090 is amended to reflect the repeal of the homestead declaration procedure in Sections 704.910-704.995. The homestead exemption is governed by Sections 704.710-704.860. The protection of voluntary sale proceeds under the former homestead declaration procedure is continued in Section 704.720.

**Code Civ. Proc. § 704.720 (amended). Homestead exemption**

SEC. 5. Section 704.720 of the Code of Civil Procedure is amended to read:

704.720. (a) A homestead is exempt from enforcement of a money judgment as provided in this article and is exempt from sale under this division to the extent provided in Section 704.800.

(b) The proceeds from a disposition of a homestead are exempt under the following conditions:

(1) If a homestead is sold under this division or is damaged or destroyed or is acquired for public use, the proceeds of sale or of insurance or other indemnification for damage or destruction of the homestead or the proceeds received as compensation for a homestead acquired for public use are exempt in the amount of the homestead exemption provided in Section 704.730. The proceeds are exempt for a period of six months after the time date the proceeds are actually received by the judgment debtor, except that, if a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during that period, the proceeds thereafter are not exempt.

(2) If a homestead is voluntarily sold, or otherwise sold in a manner not described in paragraph (1), the proceeds of sale are exempt in the amount of the homestead exemption provided in Section 704.730 for a period of six months after the date of the sale.

(3) If a homestead exemption is applied to other property of the judgment debtor or the judgment debtor's spouse during the six-month period provided in paragraph (1) or (2), the proceeds exemption terminates.

(c) If the judgment debtor and spouse of the judgment debtor reside in separate homesteads, only the homestead of one of the spouses is exempt and only the proceeds of the exempt homestead are exempt.

(d) The exemption of proceeds provided in paragraph (2) of subdivision (b) does not apply to the enforcement of a judgment for child, family, or spousal support, unless the judgment debtor obtains an order, on noticed motion, that the proceeds are exempt in all or part. In making this determination, the court shall apply the standards provided in subdivision (c) of Section 703.070.

**Comment.** Subdivision (a) of Section 704.720 is revised for clarity and for consistency with other exemption provisions. See, e.g., Sections 703.010, 704.010, 704.020.

Subdivision (b) is amended to adopt as a general rule the exemption for proceeds of voluntary sales under former Section 704.960 (homestead declaration). Subdivision (b)(3) is generalized from the last clause of former subdivision (b) of this section. See also Section 703.080 (tracing exempt funds).

Subdivision (d) is a new provision that implements the application of the general rule on equitable division of exemptions in Section 703.070 in a situation where the judgment

debtor has multiple support obligees. Unlike the general rule, however, subdivision (d) places the burden on the judgment debtor to file the motion and seek the court order.

**Revised Background Comment (1982).** Subdivision (a) of Section 704.720 supersedes former Civil Code Section 1240 (providing for a declared homestead) and former Code of Civil Procedure Sections 690.3 and 690.31(a) (providing for a claimed dwelling exemption). Unlike the former provisions, Section 704.720 does not specify the interest that is protected and does not limit the homestead in a leasehold to a long-term lease; any interest sought to be reached by the judgment creditor in the homestead may be entitled to the exemption. The homestead exemption does not apply where a lien on the property other than an enforcement lien is being foreclosed. See Section 703.010.

Subdivision (b)(1) provides an exemption for proceeds of an execution sale of a homestead, for proceeds from insurance or indemnification for the damage or destruction of a homestead, and for an eminent domain award or proceeds of a sale of the homestead for public use. Subdivision (b)(1) supersedes portions of former Civil Code Sections 1256 and 1265 and of former Code of Civil Procedure Sections 690.8 and 690.31(k). The exemption for insurance proceeds was not found in former law. *But see* Houghton v. Lee, 50 Cal. 101, 103 (1875) (insurance proceeds for destruction of declared homestead exempt).

Subdivision (c) is new. The spouses may select which of the homesteads is exempt. If the spouses are unable to agree, the court determines which homestead is exempt. See Section 703.110 (application of exemptions to marital property). Note that a married person may, after a decree of legal separation or an interlocutory judgment of dissolution of marriage, be entitled to a homestead in his or her own right, and this right is not affected by subdivision (c). See Section 704.710(d) ("spouse" defined) & Comment.

**Code Civ. Proc. § 704.760 (amended). Contents of application for sale of dwelling**

SEC. 6. Section 704.760 of the Code of Civil Procedure is amended to read:

704.760. The judgment creditor's application shall be made under oath, shall describe the dwelling, and shall contain all of the following:

(a) A statement whether or not the records of the county tax assessor indicate that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling and the person or persons who claimed ~~any such~~ the exemption.

(b) A statement, which may be based on information and belief, whether the dwelling is a homestead and the amount of the homestead exemption, if any, ~~and a statement whether or not the records of the county recorder indicate that a homestead declaration under Article 5 (commencing with Section 704.910) that describes the dwelling has been recorded by the judgment debtor or the spouse of the judgment debtor.~~

(c) A statement of the amount of any liens or encumbrances on the dwelling, the name of each person having a lien or encumbrance on the dwelling, and the person's address ~~of such person~~ used by the county recorder for the return of the instrument creating ~~such~~ the person's lien or encumbrance after recording.

**Comment.** Subdivision (b) of Section 704.760 is amended to delete the obsolete reference to the repealed homestead declaration procedure. See also Section 694.090 (effect of homestead declarations under prior law). The other changes are technical, nonsubstantive revisions.

**Code Civ. Proc. § 704.780 (amended). Hearing**

SEC. 7. Section 704.780 of the Code of Civil Procedure is amended to read:

704.780. (a) The burden of proof at the hearing is determined in the following manner:

(1) If the records of the county tax assessor indicate that there is a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the judgment creditor has the burden of proof that the dwelling is not a homestead. If the records of the county tax assessor indicate that there is not a current homeowner's exemption or disabled veteran's exemption for the dwelling claimed by the judgment debtor or the judgment debtor's spouse, the burden of proof that the dwelling is a homestead is on the person who claims that the dwelling is a homestead.

(2) If the application states the amount of the homestead exemption, the person claiming the homestead exemption has the burden of proof that the amount of the exemption is other than the amount stated in the application.

(b) The court shall determine whether the dwelling is exempt. If the court determines that the dwelling is exempt, the court shall determine the amount of the homestead exemption and the fair market value of the dwelling. The court shall make an order for sale of the dwelling subject to the homestead exemption, unless the court determines that the sale of the dwelling would not be likely to produce a bid sufficient to satisfy any part of the amount due on the judgment pursuant to Section 704.800. The order for sale of the dwelling subject to the homestead exemption shall specify the amount of the proceeds of the sale that is to be distributed pursuant to Section 704.850 to each person having a lien or encumbrance on the dwelling that is superior to the judgment creditor's lien, and shall include the name and address of each such person. Subject to the provisions of this article, the sale is governed by Article 6 (commencing with Section 701.510) of Chapter 3. If the court determines that the dwelling is not exempt, the court shall make an order for sale of the property in the manner provided in Article 6 (commencing with Section 701.510) of Chapter 3.

(c) The court clerk shall transmit a certified copy of the court order (1) to the levying officer and (2) if the court making the order is not the court in which the judgment was entered, to the clerk of the court in which the judgment was entered.

(d) The court may appoint a qualified appraiser to assist the court in determining the fair market value of the dwelling. If the court appoints an appraiser, the court shall fix the compensation of the appraiser in an amount determined by the court to be reasonable, not to exceed similar fees for similar services in the community where the dwelling is located.

**Comment.** Subdivision (b) of Section 704.780 is amended to make clear that only liens with priority over the judgment creditor's lien, upon which the property is to be sold, are entitled to satisfaction from the proceeds of sale. See also Sections 704.800 (minimum bid), 704.850 (distribution of proceeds).

**Code Civ. Proc. § 704.800 (amended). Minimum bid at sale of homestead**

SEC. 8. Section 704.800 of the Code of Civil Procedure is amended to read:

704.800. (a) If no bid is received at a sale of a homestead pursuant to a court order for sale that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, including but not limited to any attachment or judgment lien, that are superior to the judgment creditor's lien, the homestead shall not be sold and shall be released and is not thereafter subject to a court order for sale upon subsequent application by the same judgment creditor for a period of one year after the date set for the sale.

(b) If no bid is received at the sale of a homestead pursuant to a court order for sale that is 90 percent or more of the fair market value determined pursuant to Section 704.780, the homestead shall not be sold unless the court, upon motion of the judgment creditor, does one of the following:

(1) Grants permission to accept the highest bid that exceeds the amount of the minimum bid required by subdivision (a).

(2) Makes a new order for sale of the homestead.

**Comment.** Subdivision (a) of Section 704.800 is amended to provide that only liens senior to the judgment creditor's lien, taking into account any relation back, are entitled to satisfaction out of the proceeds from the sale of a dwelling under this article. See also Sections 704.780 (hearing), 704.850 (distribution of proceeds).

**Code Civ. Proc. § 704.840 (amended). Costs incurred in sale proceedings**

SEC. 9. Section 704.840 of the Code of Civil Procedure is amended to read:

704.840. (a) Except as provided in subdivision (b), the judgment creditor is entitled to recover reasonable costs incurred in a proceeding under this article.

(b) If no bid is received at a sale of a homestead pursuant to a court order for sale that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property that are superior to the judgment creditor's lien, the judgment creditor is not entitled to recover costs incurred in a proceeding under this article or costs of sale.

**Comment.** Section 704.840 is amended for consistency with Section 704.800.

**Code Civ. Proc. § 704.850 (amended). Distribution of proceeds of sale of homestead**

SEC. 10. Section 704.850 of the Code of Civil Procedure is amended to read:

704.850. (a) The levying officer shall distribute the proceeds of sale of a homestead in the following order:

(1) To the discharge of all liens and encumbrances, ~~if any~~, on the property that are superior to the judgment creditor's lien.

(2) To the judgment debtor in the amount of any applicable exemption of proceeds pursuant to Section 704.720.

(3) To the levying officer for the reimbursement of the levying officer's costs for which an advance has not been made.

(4) To the judgment creditor to satisfy the following:

(A) First, costs and interest accruing after issuance of the writ pursuant to which the sale is conducted.

(B) Second, the amount due on the judgment with costs and interest, as entered on the writ.

(5) To any other judgment creditors who have delivered writs of execution to the levying officer, accompanied by instructions to levy on the proceeds of sale, in the amounts to which the persons are entitled in order of their respective priorities.

(6) To the judgment debtor in the amount remaining.

(b) Sections 701.820 and 701.830 apply to distribution of proceeds under this section.

**Comment.** Subdivision (a)(1) of Section 704.850 is amended for consistency with Section 704.800. The words "if any" are deleted as surplus. A new subdivision (a)(5) is added to permit junior creditors whose liens will be extinguished pursuant to Section 704.860 to seek satisfaction from any excess proceeds at the sale, by delivering a writ of execution and levy instructions to the levying officer. This procedure is consistent with the general rule in Section 701.810(g) (distribution of proceeds of sale or collection). Note that under the rule in Section 704.800(a) the items listed in paragraphs (1) and (2) of subdivision (a) are of equal priority since the homestead may not be sold unless all senior liens and encumbrances are satisfied and the judgment debtor receives the full amount of the applicable exemption.

**Revised Background Comment (1982).** Subdivision (a) of Section 704.850 continues the priority of distribution of proceeds provided by subdivision (j) of former Section 690.31 and of former Civil Code Section 1255. This section is an exception to the general rules on distribution of proceeds provided by Section 701.810. Liens and encumbrances required to be satisfied under subdivision (a)(1) include not only preferred labor claims to be satisfied pursuant to Section 1206 and the amount of any state tax lien (as defined in Government Code Section 7162) but also any other liens and encumbrances with priority over the judgment creditor's lien.

Subdivision (b) makes clear that the general provisions governing the time for distributing proceeds (Section 701.820) and the resolution of conflicting claims to proceeds (Section 701.830) apply to the distribution of proceeds from the sale of a homestead.

**Code Civ. Proc. § 704.860 (added). Extinction of liens upon sale**

SEC. 11. Section 704.860 is added to the Code of Civil Procedure, to read:

704.860. If property is sold pursuant to this article, the lien under which it is sold and any liens subordinate thereto on the property sold are extinguished.

**Comment.** Section 704.860 is new. The rule in this section applicable to homestead sales is consistent with the general rule under Section 701.630.

**Code Civ. Proc. §§ 704.910-704.995 (repealed). Declared homestead**

SEC. 12. Article 5 (commencing with Section 704.910) of Chapter 4 of Division 2 of Title 9 of Part 2 of the Code of Civil Procedure is repealed.

**Note.** The text of Sections 704.910-704.995 is set out *infra*. See material under "Comments to Repealed Sections."

**Gov't Code § 7170 (technical amendment). Attachment of tax lien**

SEC. 13. Section 7170 of the Government Code is amended to read:

7170. (a) Except as provided in subdivisions (b) and (c), a state tax lien attaches to all property and rights to property whether real or personal, tangible or

intangible, including all after-acquired property and rights to property, belonging to the taxpayer and located in this state. ~~A state tax lien attaches to a dwelling notwithstanding the prior recording of a homestead declaration (as defined in Section 704.910 of the Code of Civil Procedure).~~

(b) A state tax lien is not valid as to real property against the right, title, or interest of any of the following persons where the person's right, title, or interest was acquired or perfected prior to recording of the notice of state tax lien in the office of the county recorder of the county in which the real property is located pursuant to Section 7171:

- (1) A successor in interest of the taxpayer without knowledge of the lien.
- (2) A holder of a security interest.
- (3) A mechanic's lienor.
- (4) A judgment lien creditor.

(c) A state tax lien is not valid as to personal property against:

(1) The holder of a security interest in the property whose interest is perfected pursuant to Section 9303 of the Commercial Code prior to the time the notice of the state tax lien is filed with the Secretary of State pursuant to Section 7171.

(2) Any person (other than the taxpayer) who acquires an interest in the property under the law of this state without knowledge of the lien or who perfects an interest in accordance with the law of this state prior to the time that the notice of state tax lien is filed with the Secretary of State pursuant to Section 7171.

(3) A buyer in ordinary course of business who, under Section 9307 of the Commercial Code, would take free of a security interest created by the seller.

(4) Any person (other than the taxpayer) who, notwithstanding the prior filing of the notice of the state tax lien:

(A) Is a holder in due course of a negotiable instrument.

(B) Is a holder to whom a negotiable document of title has been duly negotiated.

(C) Is a bona fide purchaser of a security.

(D) Is a purchaser of chattel paper or an instrument who gives new value and takes possession of the chattel paper or instrument in the ordinary course of business.

(E) Is a holder of a purchase money security interest.

(F) Is a collecting bank holding a security interest in items being collected, accompanying documents and proceeds, pursuant to Section 4210 of the Commercial Code.

(G) Acquires a security interest in a deposit account or in the beneficial interest in a trust or estate.

(H) Acquires any right or interest in letters of credit, advices of credit, or money.

(I) Acquires without actual knowledge of the state tax lien a security interest in or a claim in or under any policy of insurance including unearned premiums.

(J) Acquires any right or interest in property subject to a certificate of title statute of another jurisdiction under the law of which indication of a security interest on

the certificate of title is required as a condition of perfection of the security interest.

(5) A judgment lien creditor whose lien was created by the filing of a notice of judgment lien on personal property with the Secretary of State prior to the time the notice of state tax lien is filed with the Secretary of State pursuant to Section 7171.

**Comment.** The second sentence of Section 7170(a) is deleted in view of the repeal of the homestead declaration procedure. See also Code Civ. Proc. §§ 688.030 (exemptions from enforcement of tax), 694.090 (effect of homestead declaration under former law), 704.850 (satisfaction of liens upon execution sale of homestead).

**Prob. Code § 6528 (repealed). Declared homestead**

SEC. 14. Section 6528 of the Probate Code is repealed.

~~6528. Nothing in this chapter terminates or otherwise affects a declaration of homestead by, or for the benefit of, a surviving spouse or minor child of the decedent with respect to the community, quasi-community, or common interest of the surviving spouse or minor child in property in the decedent's estate. This section is declaratory of, and does not constitute a change in, existing law.~~

**Comment.** Section 6528 is repealed because it has no purpose in view of the repeal of the homestead declaration procedure. See also Code Civ. Proc. § 694.090 (effect of homestead declaration under former law). Repeal of this section has no effect on the ability of a surviving judgment debtor to take advantage of the homestead exemption provided in Code of Civil Procedure Sections 704.710-704.860.

COMMENTS TO REPEALED SECTIONS

**Code Civ. Proc. §§ 704.910-704.995 (repealed). Declared homestead**

**Note.** Sections 704.910-704.995 are set out below for reference purposes. A Comment to each section indicates its proposed disposition in the revised statute or its relation to the general homestead exemption provisions that supersede the homestead declaration procedure.

Article 5. Declared Homesteads

**§ 704.910 (repealed). Definitions**

704.910. As used in this article:

(a) "Declared homestead" means the dwelling described in a homestead declaration.

(b) "Declared homestead owner" includes both of the following:

(1) The owner of an interest in the declared homestead who is named as a declared homestead owner in a homestead declaration recorded pursuant to this article.

(2) The declarant named in a declaration of homestead recorded prior to July 1, 1983, pursuant to former Title 5 (commencing with Section 1237) of Part 4 of Division 2 of the Civil Code and the spouse of such declarant.

(c) "Dwelling" means any interest in real property (whether present or future, vested or contingent, legal or equitable) that is a "dwelling" as defined in Section 704.710, but does not include a leasehold estate with an unexpired term of less than two years or the interest of the beneficiary of a trust.

(d) "Homestead declaration" includes both of the following:

(1) A homestead declaration recorded pursuant to this article.

(2) A declaration of homestead recorded prior to July 1, 1983, pursuant to former Title 5 (commencing with former Section 1237) of Part 4 of Division 2 of the Civil Code.

(e) "Spouse" means a "spouse" as defined in Section 704.710.

**Comment.** Former Section 704.910 is superseded by Section 704.710.

**§ 704.920 (repealed). Manner of selection of homestead**

704.920. A dwelling in which an owner or spouse of an owner resides may be selected as a declared homestead pursuant to this article by recording a homestead declaration in the office of the county recorder of the county where the dwelling is located. From and after the time of recording, the dwelling is a declared homestead for the purposes of this article.

**Comment.** Former Section 704.920 is superseded by the homestead exemption procedure in Sections 704.710-704.860. See also Sections 694.090 (effect of homestead declaration under prior law), 704.710 (definitions).

**§ 704.930 (repealed). Execution and contents of homestead declaration**

704.930. (a) A homestead declaration recorded pursuant to this article shall contain all of the following:

(1) The name of the declared homestead owner. A husband and wife both may be named as declared homestead owners in the same homestead declaration if each owns an interest in the dwelling selected as the declared homestead.

(2) A description of the declared homestead.

(3) A statement that the declared homestead is the principal dwelling of the declared homestead owner or such person's spouse, and that the declared homestead owner or such person's spouse resides in the declared homestead on the date the homestead declaration is recorded.

(b) The homestead declaration shall be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property by at least one of the following persons:

(1) The declared homestead owner.

(2) The spouse of the declared homestead owner.

(3) The guardian or conservator of the person or estate of either of the persons listed in paragraph (1) or (2). The guardian or conservator may execute, acknowledge, and record a homestead declaration without the need to obtain court authorization.

(4) A person acting under a power of attorney or otherwise authorized to act on behalf of a person listed in paragraph (1) or (2).

(c) The homestead declaration shall include a statement that the facts stated in the homestead declaration are known to be true as of the personal knowledge of the person executing and acknowledging the homestead declaration. If the homestead declaration is executed and acknowledged by a person listed in paragraph (3) or (4) of subdivision (b), it shall also contain a statement that the person has authority to so act on behalf of the declared homestead owner or the spouse of the declared homestead owner and the source of the person's authority.

**Comment.** Former Section 704.930 is superseded by the homestead exemption procedure in Sections 704.710-704.860.

**§ 704.940 (repealed). Right to convey or encumber not limited; Evidentiary effect of homestead**

704.940. A homestead declaration does not restrict or limit any right to convey or encumber the declared homestead. A homestead declaration, when properly recorded, is prima facie evidence of the facts therein stated, and conclusive evidence thereof in favor of a purchaser or encumbrancer in good faith and for a valuable consideration.

**Comment.** Former Section 704.940 is superseded by the homestead exemption procedure in Sections 704.710-704.860. See also Section 704.780 (burden of proof in hearing on homestead exemption).

**§ 704.950 (repealed). Attachment of judgment lien to homestead**

704.950. (a) Except as provided in subdivisions (b) and (c), a judgment lien on real property created pursuant to Article 2 (commencing with Section 697.310) of Chapter 2 does not attach to a declared homestead if both of the following requirements are satisfied:

(1) A homestead declaration describing the declared homestead was recorded prior to the time the abstract or certified copy of the judgment was recorded to create the judgment lien.

(2) The homestead declaration names the judgment debtor or the spouse of the judgment debtor as a declared homestead owner.

(b) This section does not apply to a judgment lien created under Section 697.320 by recording a certified copy of a judgment for child, family, or spousal support.

(c) A judgment lien attaches to a declared homestead in the amount of any surplus over the total of the following:

(1) All liens and encumbrances on the declared homestead at the time the abstract of judgment or certified copy of the judgment is recorded to create the judgment lien.

(2) The homestead exemption set forth in Section 704.730.

**Comment.** Former Section 704.950 is superseded by the homestead exemption procedure in Sections 704.710-704.860.

**§ 704.960 (repealed). Proceeds exemption after voluntary sale; Reinvestment of proceeds of voluntary or involuntary sale and effect of new declaration**

704.960. (a) If a declared homestead is voluntarily sold, the proceeds of sale are exempt in the amount provided by Section 704.730 for a period of six months after the date of sale.

(b) If the proceeds of a declared homestead are invested in a new dwelling within six months after the date of a voluntary sale or within six months after proceeds of an execution sale or of insurance or other indemnification for damage or destruction are received, the new dwelling may be selected as a declared homestead by recording a homestead declaration within the applicable six-month period. In such case, the homestead declaration has the same effect as if it had been recorded at the time the prior homestead declaration was recorded.

**Comment.** Former Section 704.960 is superseded by the homestead exemption procedure in Sections 704.710-704.860. The proceeds exemption is continued in Section 704.720(b).

**§ 704.965 (repealed). Determination of amount of exemption**

704.965. If a homestead declaration is recorded prior to the operative date of an amendment to Section 704.730 which increases the amount of the homestead exemption, the amount of the exemption for the purposes of subdivision (c) of Section 704.950 and Section 704.960 is the increased amount, except that, if the judgment creditor obtained a lien on the declared homestead prior to the operative date of the amendment to Section 704.730, the exemption for the purposes of subdivision (c) of Section 704.950 and Section 704.960 shall be determined as if that amendment to Section 704.730 had not been enacted.

**Comment.** Former Section 704.965 is superseded by the homestead exemption procedure in Sections 704.710-704.860. The principle in former Section 704.965 is applicable under the general rule in Section 703.050 (exemptions in effect at time of lien govern).

**§ 704.970 (repealed). Effect of article on rights after levy of execution**

704.970. Whether or not a homestead declaration has been recorded:

(a) Nothing in this article affects the right of levy pursuant to a writ of execution.

(b) Any levy pursuant to a writ of execution on a dwelling (as defined in Section 704.710) and the sale pursuant thereto shall be made in compliance with Article 4 (commencing with Section 704.710) and the judgment debtor and the judgment creditor shall have all the rights and benefits provided by that article.

**Comment.** Section 704.970 is repealed as unnecessary following repeal of the homestead declaration procedure. The homestead exemption is now governed exclusively by Article 4 (commencing with Section 704.710) and related rules.

**§ 704.980 (repealed). Declaration of abandonment**

704.980.(a) A declared homestead may be abandoned by a declaration of abandonment under this section, whether the homestead declaration was recorded pursuant to this article or pursuant to former Title 5 (commencing with former Section 1237) of Part 4 of Division 2 of the Civil Code.

(b) A declaration of abandonment shall be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property. It shall be executed and acknowledged by a declared homestead owner or by a person authorized to act on behalf of a declared homestead owner. If it is executed and acknowledged by a person authorized to act on behalf of a declared homestead owner, the declaration shall contain a statement that the person has authority to act on behalf of the declared homestead owner and the source of the person's authority.

(c) The declaration of abandonment does not affect the declared homestead of any person other than the declared homestead owner named in the declaration of abandonment.

**Comment.** The procedure for abandonment in former Section 704.980 is obsolete in view of the repeal of the homestead declaration procedure. See also Section 694.090 (effect of homestead declarations under prior law).

**§ 704.990 (repealed). Abandonment of homestead by recording homestead declaration for different property**

704.990. (a) A declared homestead is abandoned by operation of law as to a declared homestead owner if the declared homestead owner or a person authorized to act on behalf of the declared homestead owner executes, acknowledges, and records a new homestead declaration for the declared homestead owner on different property. An abandonment under this subdivision does not affect the declared homestead of any person other than the declared homestead owner named in the new homestead declaration.

(b) Notwithstanding subdivision (a), if a homestead declaration is recorded which includes property described in a previously recorded homestead declaration, to the extent that the prior homestead declaration is still valid, the new homestead declaration shall not be considered an abandonment of the prior declared homestead.

**Comment.** Former Section 704.990 relating to abandonment is obsolete in view of the repeal of the homestead declaration procedure. See also Section 694.090 (effect of homestead declarations under prior law).

**§ 704.995 (repealed). Continuation of protection after death of declared homestead owner**

704.995. (a) The protection of the declared homestead from any creditor having an attachment lien, execution lien, or judgment lien on the dwelling continues after the death of the declared homestead owner if, at the time of the death, the dwelling was the principal dwelling of one or more of the following persons to whom all or part of the interest of the deceased declared homestead owner passes:

- (1) The surviving spouse of the decedent.
- (2) A member of the family of the decedent.

(b) The protection of the declared homestead provided by subdivision (a) continues regardless of whether the decedent was the sole owner of the declared homestead or owned the declared homestead with the surviving spouse or a

member of the decedent's family and regardless of whether the surviving spouse or the member of the decedent's family was a declared homestead owner at the time of the decedent's death.

(c) The amount of the homestead exemption is determined pursuant to Section 704.730 depending on the circumstances of the case at the time the amount is required to be determined.

**Comment.** Former Section 704.995 is superseded by the homestead exemption procedure in Sections 704.710-704.860. The general homestead exemption applies with full force to the interest of the survivor, consistent with the rule in subdivision (c). Additional protection is provided by the probate homestead procedure. See Prob. Code §§ 6520-6527.

## REVISED COMMENTS

### **Code Civ. Proc. § 704.710 (revised comment). Definitions**

**Revised Background Comment (1982).** Subdivision (a) of Section 704.710 supersedes the provisions of former law pertaining to the property that could be exempt as a homestead or dwelling. See former Civ. Code § 1237 (declared homestead); former Code Civ. Proc. §§ 690.3 (house trailer, mobile home, houseboat, boat, or other waterborne vessel), 690.31(a) (dwelling house). Subdivision (a) is intended to include all forms of property for which an exemption could be claimed under former law and any other property in which the judgment debtor or the judgment debtor's spouse actually resides.

Subdivision (b) continues the substance of former Civil Code Section 1261(2) except that the minor grandchild of a deceased spouse and a child or grandchild of a former spouse are included in the listing.

Subdivision (c) is intended to preclude a judgment debtor from moving into a dwelling after creation of a judgment lien or after levy in order to create an exemption. Subdivision (c) also makes clear that, even though an abstract of judgment has been recorded to create a judgment lien, the existence of the lien does not prevent a homestead exemption on after-acquired property that is acquired as the principal dwelling using exempt proceeds. Subdivision (c) is an exception to the rule of Section 703.100 (time for determination of exemption).

Subdivision (d) preserves the effect of former Civil Code Sections 1300-1304 (married person's separate homestead). The effect of subdivision (d) is to permit each spouse to claim a separate homestead after entry of a judgment decreeing legal separation or of an interlocutory judgment of dissolution of the marriage, because subdivision (c) of Section 704.720 is not applicable.

**Revised Background Comment (1983).** Section 704.710 is amended to delete "actually" which appeared before "resides" or "resided" in various provisions. The word "actually" is deleted to avoid a possible construction that a person temporarily absent (such as a person on vacation or in the hospital) could not claim a homestead exemption for the principal dwelling merely because the person is temporarily absent, even though the dwelling is the person's principal dwelling and residence.